

No. 2:20-cv-01831-NR

V.

Defendants.

2. Zicarelli is a qualified elector residing in Westmoreland County who voted in person on Election Day, for herself.

3. James Brewster is the Democratic candidate for Pennsylvania Senate District 45 in the 2020 General Election.

4. Pennsylvania Senate District 45 covers part of Allegheny County and part of Westmoreland County.

5. The Allegheny County Board of Elections is generally responsible for overseeing the conduct of all elections in Allegheny County.

6. The Allegheny County Board of Elections has three members.

7. Rich Fitzgerald is a member of the Allegheny County Board of Elections.

8. Samuel DeMarco is a member of the Allegheny County Board of Elections.

9. Bethany Hallam is a member of the Allegheny County Board of Elections. For purposes of these stipulations, Defendants the Allegheny County Board of Elections, Rich Fitzgerald, Samuel DeMarco and Bethany Hallam are collectively referred to as “the Allegheny Board.”

10. The Westmoreland County Board of Elections is generally responsible for overseeing the conduct of all elections in Westmoreland County.

11. Kathy Boockvar is the Secretary of the Commonwealth of Pennsylvania.

12. The Secretary of the Commonwealth has duties under the Election Code to, among other things, receive certified election returns from county boards of election and to issue certificates of election.

13. On September 11, 2020, Secretary of the Commonwealth Kathy Boockvar issued public guidance entitled “Guidance Concerning Examination of Absentee and Mail-in Ballot Return Envelopes.”

14. Attached hereto as Exhibit A, is a true, correct, and authentic copy of the Secretary’s September 11, 2020 Guidance.

15. On September 28, 2020, Secretary of the Commonwealth Kathy Boockvar issued public guidance entitled “Guidance Concerning Civilian Absentee and Mail-In Ballot Procedures.”

16. Attached hereto as Exhibit B, is a true, correct, and authentic copy of the Secretary’s September 28, 2020 Guidance.

17. The Allegheny Board received and reviewed the September 11, 2020 and September 28, 2020 Guidance before November 3, 2020.

18. On or about October 5, 2020, Secretary Boockvar submitted a brief to the United States Supreme Court in *Scarnati v. Boockvar*, Nos. 20A53 & 20A54.

19. Attached hereto as Exhibit C, is a true, correct, and authentic copy of Secretary Boockvar’s October 5 brief to the United States Supreme Court.

20. On or about November 30, 2020, Secretary Boockvar submitted a brief to the United States Supreme Court in *Scarnati v. Boockvar*, No. 20-542.

21. Attached hereto as Exhibit D, is a true, correct, and authentic copy of Secretary Boockvar’s November 30 brief to the United States Supreme Court.

22. On or about October 29, 2020, the Allegheny County Elections Division published on its website a video, with accompanying website text, entitled “Mail in Ballot Instructions.”

23. Attached hereto as Exhibit E, is a true, correct, and authentic copy of a screenshot of the Mail in Ballot Instructions video and accompanying website text as published on the internet.

24. A true, correct, and authentic copy of the Mail in Ballot Instructions video will be submitted to the Court on physical electronic media as Exhibit F.

25. The Allegheny County Elections Division sent to all Allegheny County voters who requested a mail-in/absentee ballot, and who were eligible to receive one, a document entitled “Instructions for Voting Your Absentee/Mail-In Ballot,” which included the following instruction: “Sign and print your name and the date beneath the ‘VOTER’S DECLARATION’ on the return envelope.”

26. The 2020 General Election was held on November 3, 2020.

27. The Allegheny Board received approximately 350,000 mail-in/absentee ballots for the 2020 General Election.

28. On November 14, 2020, the Allegheny Board voted to not count 13 provisional ballots from the 2020 General Election because the voter declaration was unsigned.

29. From the entirety of Allegheny County, the Allegheny Board received 2,349 mail-in/absentee ballots from the 2020 General Election that did not have a dated voter declaration.

30. All 2,349 undated mail-in/absentee ballots were returned to the Allegheny Board by 8:00 p.m. on election day.

31. Concerning just Senate District 45, the Allegheny Board received 311 mail-in/absentee ballots from the 2020 General Election that did not have a dated voter declaration (hereafter, “the Allegheny District 45 Undated Mail-in Ballots”).

32. The Allegheny District 45 Undated Mail-in Ballots contained 202 votes for Brewster and 109 votes for Zicarelli, a difference of 93 votes in favor of Brewster.

33. On November 10, 2020, the Allegheny Board decided during a meeting, by a vote of 2-1, to count the undated mail-in/absentee ballots, including the Allegheny District 45 Undated Mail-in Ballots.

34. On November 12, 2020, Zicarelli filed with the Allegheny County Court of Common Pleas a Petition for Review in the Nature of an Appeal of the Allegheny Board’s decision to count the Allegheny District 45 Undated Mail-in Ballots. *See In Re: 2,349 Ballots in the 2020 General Election*, No. GD 20-011654 (C.P. Allegheny) (captioned by the court as *Zicarelli v. Allegheny County Board of Elections*).

35. The trial court conducted a hearing on November 17, 2020, and denied the Petition for Review on November 18, 2020.

36. The trial court’s November 18 Order, stated in total, as follows:

And NOW, this 18th day of November 2020, upon consideration of the Petition for Review In the Nature Of A Statutory Appeal filed by Nicole Zicarelli, and any responses thereto, it is hereby ORDERED

that Petitioner's appeal is dismissed and the decision of the Board of Elections is affirmed.

37. A true, correct, and authentic copy of the trial court's memorandum and order is attached to Plaintiff's First Amended Complaint (doc. 29) as Exhibit A.

38. On November 18, 2020, Zicarelli appealed the Common Pleas Court decision to the Commonwealth Court of Pennsylvania. *See In Re: 2,349 Ballots in the 2020 General Election (Appeal of: Nicole Zicarelli)*, No. 1162 CD 2020 (Pa. Cmwlth.)

39. On November 19, 2020, the Commonwealth Court of Pennsylvania reversed the trial court's order and remanded for further proceedings.

40. A true, correct, and authentic copy of the Commonwealth Court's memorandum opinion and order is attached to Plaintiff's First Amended Complaint (doc. 29) as Exhibit B.

41. On November 20, 2020, the Allegheny Board filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court, which the Supreme Court granted on November 20, 2020 and docketed at 29 WAP 2020. The Court then consolidated the Allegheny County appeal with a series of appeals from Philadelphia County.

42. On November 23, 2020, the Pennsylvania Supreme Court issued a decision in 29 WAP 2020, with three justices writing opinions.

43. True, correct, and authentic copies of the Supreme Court's opinions are attached to Plaintiff's First Amended Complaint (doc. 29) as Exhibits C-E.

44. On November 24, 2020, Zicarelli filed an Emergency Application for Reargument with the Pennsylvania Supreme Court. On November 25, 2020, the Pennsylvania Supreme Court denied Zicarelli's Application. Attached hereto as Exhibit G, is a true, correct, and authentic copy of the Application and the Order denying that Application.

45. On November 25, 2020, the Commonwealth Court issued a single judge memorandum opinion in *In re Canvass of Absentee and/or Mail in Ballots of November 3, 2020 General Election (Appeal of Donald J. Trump for President, Inc.)*, No. 1191 C.D. 2020 (Nov. 25, 2020).

46. Attached hereto as Exhibit H, is a true, correct, and authentic copy of the unpublished decision.

47. Zicarelli has not appealed the November 23, 2020 Pennsylvania Supreme Court decision to the Supreme Court of the United States.

48. At no point in the *In Re: 2,349 Ballots in the 2020 General Election (Appeal of: Nicole Zicarelli)* proceedings did Zicarelli raise equal protection or due process concerns related to possible disparate treatment between Allegheny and Westmoreland Counties.

49. At no point in time on or before November 23, 2020 did any group file a recount or contest for Pennsylvania Senate District 45.

50. Prior to November 23, 2020, the Allegheny Board counted the Allegheny District 45 Undated Mail-in Ballots.

51. On November 23, 2020, the Allegheny Board certified the results of the 2020 General Election, which results included a separate tally of the undated ballots which were not included in the overall total votes counted.

52. On November 25, 2020, the Allegheny Board approved an amended certification which included the undated ballot totals and submitted that amended certification to Secretary Boockvar. The total votes for Senate District 45 from the 2020 General Election were as follows: 57,782 votes for Brewster and 51,561 votes for Ziccarelli. This certification included the 311 Allegheny District 45 Undated Mail-in Ballots.

53. Without the Allegheny District 45 Undated Mail-in Ballots, the Allegheny Board would have certified 57,580 votes for Brewster and 51,452 votes for Ziccarelli, as indicated in the initial November 23, 2020 certification.

54. Secretary Boockvar received the Allegheny Board's amended final certification, inclusive of the Allegheny District 45 Undated Mail-in Ballots.

55. The final tabulated vote totals in Senate District 45 from Allegheny County, which included certain ballots that were received by the Board between 8:00 p.m. on election day and 5:00 p.m. on Friday, November 6 and counted in accordance with an Order of the Pennsylvania Supreme Court, were 57,815 votes for Brewster and 51,588 votes for Ziccarelli. This total includes the 311 Allegheny District 45 Undated Mail-in Ballots.

56. In Westmoreland County, approximately 60,000 mail-in/absentee ballots were received by the Westmoreland County Board of Elections for the 2020 General Election.

57. The Westmoreland County Board of Elections received 343 mail-in/absentee ballots where the voter declaration was signed but undated (“the Westmoreland Undated Mail-in Ballots”). The Westmoreland County Board of Elections did not determine how many of the 343 mail-in/absentee ballots were in Pennsylvania Senate District 45.

58. On November 13, 2020, Commissioner Gina Cerelli, a member of the three-member Westmoreland County Board of Elections, proposed a motion to count the Westmoreland Undated Mail-In Ballots, but the motion did not receive a second.

59. Between November 13, 2020 and November 30, 2020, the Westmoreland Undated Mail-in Ballots were not counted.

60. On November 30, 2020, counsel for both Zicarelli and the Intervenors appeared before the Westmoreland County Board of Elections. The morning of November 30, 2020, in anticipation of the Westmoreland County Board of Elections meeting, counsel for the Intervenors provided the Board with a letter explaining why the Westmoreland Undated Mail-In Ballots should be counted. Attached hereto as Exhibit I, is a true, correct, and authentic copy of the Letter.

61. Before the Westmoreland County Board of Elections, counsel for Intervenors requested that the Westmoreland County Board of Elections count the

Westmoreland Undated Mail-in Ballots in light of the Pennsylvania Supreme Court's decision and this Court's guidance.

62. Before the Westmoreland County Board of Elections, both counsel for Zicarelli and the Chair of the Westmoreland County Republican Party requested that the Westmoreland County Board of Elections not count the Westmoreland Undated Mail-in Ballots.

63. Attached hereto as Exhibit J, is a true, correct, and authentic copy of the minutes of the November 30, 2020 Westmoreland County Board of Elections.

64. On November 30, 2020, Commissioner Gina Cerelli again proposed a motion to count the Westmoreland Undated Mail-In Ballots, but the motion again did not receive a second.

65. On November 30, 2020, the Westmoreland County Board of Elections certified to Secretary Boockvar its final election results, which certification did not include any count of the Westmoreland Undated Mail-In Ballots.

66. Neither Brewster nor Zicarelli appealed the Westmoreland County Board of Elections decision to the Westmoreland County Court of Common Pleas related to the counting of Westmoreland Undated Mail-In Ballots.

67. In total, the Westmoreland County Board of Elections certified 8,412 votes for Brewster and 14,560 votes for Zicarelli.

68. Secretary Boockvar received the Westmoreland County Board of Elections final certification, which excluded the Westmoreland Undated Mail-In Ballots.

69. The final tabulated vote totals in Senate District 45 from Westmoreland County, which included certain ballots that were received by the Board between 8:00 p.m. on election day and 5:00 p.m. on Friday, November 6 and counted in accordance with an Order of the Pennsylvania Supreme Court, were 8,446 votes for Brewster and 14,604 votes for Ziccarelli. This total does not include any of the Westmoreland Undated Mail-In Ballots.

70. Combining the Allegheny County and Westmoreland County final totals from the 2020 General Election, Brewster received 66,261 votes and Ziccarelli received 66,192 votes, a difference of 69 votes in favor of Brewster.

71. If the Allegheny District 45 Undated Mail-in Ballots were removed from the final votes for Brewster and Ziccarelli from Allegheny and Westmoreland Counties, Brewster would receive 66,059 votes and Ziccarelli would receive 66,083 votes, a difference of 24 votes in favor of Ziccarelli.

72. On December 16, 2020, Secretary Boockvar certified the general election results for the offices of Attorney General, Auditor General, State Treasurer, State Senator and State Representative. Attached hereto as Exhibit G, is a true, correct, and authentic copy of the December 16, 2020 email from the Department of State to the county Boards of Elections with attachments, including the certification.

73. By December 16, 2020, any and all appeals of decisions of the Allegheny and/or Westmoreland County Boards of Elections had been resolved and/or exhausted under the Pennsylvania Election Code.

74. As of December 21, 2020, the Secretary has not issued a certificate of election for any State Senate race regarding the 2020 General Election.

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Dated: December 21, 2020

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| <p><u>/s/ Joshua J. Voss</u> Joshua J. Voss (No. 306853) Matthew H. Haverstick (No. 85072)* Shohin H. Vance (No. 323551)* James G. Gorman (No. 328376)* Samantha G. Zimmer (No. 325650)* KLEINBARD LLC Three Logan Square 1717 Arch Street, 5th Floor Philadelphia, PA 19103 Ph: (215) 568-2000 Fax: (215) 568-0140 Eml: jvoss@kleinbard.com mhaverstick@kleinbard.com svance@kleinbard.com jgorman@kleinbard.com szimmer@kleinbard.com * Admitted Pro Hac Vice Attorneys for Plaintiff Nicole Zicarelli</p> | <p>Virginia S. Scott (No. 61647) Andrew F. Szefi Frances M. Liebenguth Allegheny County Department of Law 300 Fort Pitt Commons 445 Fort Pitt Blvd Pittsburgh, PA 15219 Ph: (412) 350-1173 Eml: virginia.scott@alleghenycounty.us aszefi@alleghenycounty.us frances.liebenguth@alleghenycounty.us Attorneys for Defendants Allegheny County Board of Elections, Rich Fitzgerald, Samuel DeMarco, and Bethany Hallam</p> |
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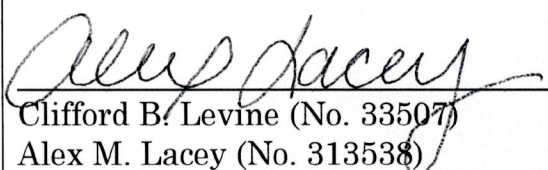
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